Filed 12/29/09 Howard v. Janumpally CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LYNETTE HOWARD et al., Plaintiffs and Appellants, v. LINGAIAH JANUMPALLY et al., Defendants and Respondents.	B210448 (Los Angeles County Super. Ct. No. MC017287)

APPEAL from judgments of the Superior Court of Los Angeles County, Carlos Baker, Judge. Affirmed.

Ivie, McNeill & Wyatt, Robert H. McNeill, Sr. and Allison R. Turner for Plaintiffs and Appellants.

Schmid & Voiles, Suzanne De Rosa and Denise H. Greer for Defendant and Respondent Lingaiah Janumpally.

Lewis Brisbois Bisgaard & Smith, Gregory G. Lynch, Jeffry A. Miller and Matthew B. Stucky for Defendant and Respondent David C. Lask.

In this professional negligence case, appellants Lynette Howard and Terrence Howard (the Howards)[1] appeal from two judgments entered on an order granting summary judgment for two of the defendants—Lingaiah Janumpally, M.D. (Janumpally) and David Lask, M.D. (Lask)—the respondents here. The trial court granted Lask's motion for summary judgment on the ground that the case against him was time-barred and granted Janumpally's motion on the ground that plaintiffs' improperly authenticated medical records failed to refute Janumpally's contention that he had no doctor-patient relationship with Howard.

On appeal, the Howards contend: (1) there are triable issues of fact with respect to Lask on the issues of the statute of limitations and the standard of care and causation; (2) Janumpally owed Howard a duty of care as a matter of law; (3) the trial court abused its discretion by entering judgment before the Howards were afforded the opportunity to move for reconsideration; and (4) the trial court abused its discretion by refusing to allow the Howards to cure evidentiary defects contained in their opposition to Janumpally's motion for summary judgment. We believe the contentions lack merit and affirm the judgment.

---

[1] As the instant appeal does not discuss Terrence Howard, singular references to "Howard" are to Lynette Howard.

BACKGROUND[2]

On May 9, 2005, Lynette Howard was taken to the emergency room at Antelope Valley Hospital (AVH) and admitted for treatment after exhibiting symptoms of a stroke. Neurologist Vijay Shanmugam, M.D. (Shanmugam) saw Howard. Shanmugam reviewed a head computed tomography (CT) scan, which confirmed that Howard had suffered a stroke. An MRI was performed, which further confirmed the diagnosis. Howard remained in the hospital and underwent medical tests for three days. Upon discharge, her physicians prescribed Coumadin, an anticoagulant, and aspirin because she was in a post-partum hypercoagulable state.

On the night of May 14, 2005, Howard went to the AVH Emergency Room (ER) complaining of weakness and paresthesia.[3] ER physician Thomas Lee (Lee) saw and examined her and ordered several diagnostic studies. Orders were issued for an electrocardiogram (EKG), chest x-ray, and a head CT scan. Lee thought Howard was having a stroke, so he asked Asaad Swissa (Swissa), a Kaiser internist, to come to the hospital and admit her and requested a consult from Janumpally, a neurologist, because stroke was within Janumpally's area of expertise as a neurologist. Lee called Janumpally

---

[2] As this is an appeal from a summary judgment, we take the background facts from the amended complaint and amendment to the complaint substituting Lask for Doe 1, as well as the documents submitted in support of and in opposition to the summary judgment motions. We accept as true the facts supported by the opposing party's evidence and the reasonable inferences from them. (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148.) We resolve evidentiary ambiguities or doubts in favor of the losing party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The facts presented here do not involve the entire course of Howard's care or treatment at issue in the lawsuit, but rather those facts pertinent to one or both of the two respondents.

[3] "An abnormal sensation of tingling, burning, crawling, or tickling." (4 Schmidt, Attorneys' Dict. of Medicine and Word Finder (2008) p. P-79.)

but did not recall the details of the conversation. Based on his dictation, Lee believed Janumpally advised him not to start the medication Heparin.

Janumpally had no recollection of the telephone call from Lee about Howard. At his deposition, he reviewed a document ostensibly from his answering service that showed a call about Howard was "patched through" to his home at about midnight on May 15, 2005. Janumpally testified at deposition that he does not place a patient on Heparin without seeing them and evaluating certain criteria. He also testified regarding the system the hospital had in place for obtaining a neurology consult: "[W]hen I go to the hospital, I pick up my consults in the hospital list. I have a code number access to the computer system. I enter my access code and pull out my names, all the names of patients needed to be seen, and majority of them I get a call from the individual doctors. And if the patient is coming from ER, ER doctor calls me. Hey, there is a consult for your request by Kaiser Dr. So-and-So. Then I would ask him is it an emergency? He says, no patient is stable. You can see after the clinic. If it is an emergency than I will go see the patient. That is the official consultation." A call from the ER to Janumpally's home could be patched through by the service for a simple question, or for a "stat" request or a neurology consult. Janumpally testified that there was no request for a stat consult order for him in the ER records for Howard.

Lee testified in deposition that he did not recall speaking to Janumpally. He also testified that his notes indicated that he "discussed the case at length with Dr. Swissa, the Kaiser internist, and Dr. Janumpally, the Kaiser neurologist; and the patient will be admitted under their care. Dr. Janumpally requested that heparin not be given."

Swissa did see Howard in the ER and discharged her from there at about 1:30 a.m. on May 15, 2005; she was not admitted to the hospital. He never spoke to Janumpally about Howard.

Before midnight, Howard underwent a CT scan of the brain without contrast, which was interpreted by the radiologist on call (Nighthawk) as being unchanged. On May 15, 2005, Howard was discharged home early in the morning with a diagnosis of

recent stroke with no change in her brain scan. She was to continue on aspirin and Coumadin and to return if there was any new weakness or neurological problem.

Lask saw the scan early in the morning on May 15, 2005, and compared it to the head CT from May 9, 2005. The "Findings" section of the report stated: "A right middle cerebral artery territory infarct is noted. There has been further extension anteriorly[.] The ventricles and cisterns are normal[.] There is no intracranial space occupying lesion[.] There is no intracranial hemorrhage[.] There is no skull fracture or lytic lesion." The "Impression" stated: "1. Right middle cerebral artery territory infarct with further extension anteriorly. No acute hemorrhage." Swissa did not review Lask's report before he discharged Howard.

At about 10:00 p.m. on May 15, Howard went to the Emergency Department of Cedars-Sinai Medical Center, complaining of a headache with a pain level of 10/10. She grew progressively weaker and subsequent CT and MRI studies at the hospital showed that she suffered several additional strokes. Physicians at Cedars-Sinai administered heparin. Howard remained in the hospital for over a month. Following discharge, Howard needed assistance to walk and her physicians recommended she use a wheelchair or walker. She continues to require rehabilitative treatment and physical therapy.

Asked at her deposition when she recalled being told that brain imaging studies were incorrectly interpreted at AVH, Howard at first said she did not recall. She was asked, "Do you believe it was around June or July or August of 2005?" Howard said, "Yes, something like that." Howard testified that she received her medical records from AVH in July 2005. Her medical records contained the radiology report of Dr. Lask's interpretation of her head CT scan performed on May 14, 2005.

The Howards' complaint for damages for: 1. professional negligence; [and] 2. loss of consortium was filed on May 12, 2006 against, among others not involved here, Lingaiah Janumpally, M.D. Their amended complaint was filed on March 27, 2007. Lask was substituted for Doe 1 on April 2, 2007.

Lask filed a motion for summary judgment on January 25, 2008 on the grounds that Lask complied with the standard of care in the care and treatment of Howard, that he

did not negligently cause or contribute to Howard's injuries and damages, that Terrence Howard could not establish a loss of consortium claim against Lask, and that the one-year statute of limitations applicable to medical malpractice actions barred the complaint. Janumpally filed a motion for summary judgment on January 31, 2008, on the ground that he did not owe Howard a duty of care as a matter of law because there was no physician-patient relationship between them, and that Terrence Howard's derivative loss of consortium claim failed based on the same proof.

The Howards opposed both motions.

With respect to Lask's motion, the Howards claimed that the statute of limitations did not begin to run until February 22, 2007, when their counsel took Swissa's deposition. They claimed that Swissa testified that he never reviewed Lask's radiological report. The Howards claimed they assumed the treating physicians had reviewed Lask's report, but after Swissa's deposition, they believed Lask was negligent in failing to notify other physicians regarding his findings. They argued they had acted diligently in identifying the causes of Howard's injuries and did not suspect Lask's negligence until the Swissa deposition. None of the arguments about delayed discovery were supported by evidence, and no declaration by Lynette Howard was submitted.

The Howards also opposed the motion for summary judgment on the issues of whether Lask breached the applicable standard of care and caused Howard's injuries.

In opposition to Janumpally's motion, the Howards argued that a legal duty to Howard arose when Lee called Janumpally requesting advice concerning treatment of a stroke patient. They argued that Howard "was not given Heparin on May 15, 2005, due to Defendant Janumpally's negligent advice to withhold it." "By specifically instructing Dr. Lee **not to start Heparin**, when Heparin was clearly indicated, there was a foreseeable risk that Plaintiff would be harmed."

Janumpally filed written evidentiary objections to the Howards' evidence, including exhibits 1 and 3, which consisted of unauthenticated copies of AVH medical records.

At the hearing on April 22, 2008, the trial court initially denied Lask's motion. Before judgment was entered, the court reconsidered its ruling on its own motion and on June 6, 2008, granted Lask's motion, but did not notify the parties before doing so. The trial court found the complaint as to Lask was time-barred. The court stated that portions of Howard's deposition transcript evidenced that she had had a suspicion of medical negligence between June and August 2005 and thus needed to have filed suit by August 2006. As for the "relation back" doctrine, the trial court stated it would not save the Howards' claims against Lask because Howard "was not genuinely ignorant of Lask's identity" within the meaning of Code of Civil Procedure section 474.[4]

Although the trial court's tentative ruling on Janumpally's motion was to deny it, the trial court took the matter under submission to rule on Janumpally's evidentiary objections, as well as the motion. On June 6, 2008, the court granted Janumpally's motion, finding that the Howards had "failed to properly authenticate the medi[c]al records in support of their Opposition" to Janumpally's motion and were thus "left without substantial evidence sufficient to refute Defendant's contention that he had no patient-doctor relationship."

The court clerk served the June 6, 2008 order granting summary judgment on June 10, 2008, by mail. While in court on June 12, 2008 for another matter in this case, the Howards' attorney learned about the summary judgment order. The Howards' counsel told the court she intended to move for reconsideration based on "new and different facts regarding the authentication of the previously unauthenticated medical records."

On June 19, 2008, separate judgments were entered on behalf of Lask and Janumpally. On June 24, 2008, the Howards moved for reconsideration of the judgment in Lask's favor. The motion was based on the declaration of Lynette Howard in which

---

[4] Unless otherwise indicated, undesignated statutory references are to the Code of Civil Procedure.

she declared that on May 3, 2008, over three months after Lask filed his summary judgment motion, she made changes to her deposition testimony relating to Lask's alleged negligence. She had previously testified in her deposition that a physician had told her that Lask incorrectly interpreted her CT scan. She now asserted that no one ever told her that. Her deposition changes included crossing out her admission that she suspected negligence in July or August 2005 and a new addition in handwriting that she was "never told that" Lask was negligent.

Lask opposed the motion on the ground that the trial court lacked jurisdiction, having entered judgment. He also suggested that, alternatively, Howard's declaration should be disregarded because it contradicted the admissions made during her deposition.

The Howards argued in reply that the trial court maintained authority to grant a motion for relief from judgment pursuant to section 473, subdivision (b). The Howards' attorney submitted a declaration stating that counsel had made a mistake in not filing Lynette Howard's declaration in opposition to the motion for summary judgment. The attorney asserted that her failure to have Howard prepare the declaration in opposition to the motion for summary judgment constituted excusable neglect such that relief from judgment should be granted.

The trial court denied the motion for reconsideration and the motion to vacate pursuant to section 473, subdivision (b).

On June 25, 2008, nearly two weeks after learning the court had granted summary judgment to Janumpally, the Howards moved for reconsideration. Janumpally opposed the reconsideration motion, arguing that the trial court lacked jurisdiction to entertain the motion once the judgment had been entered. The court denied the motion for reconsideration.

The Howards appeal.

DISCUSSION

1. Standard of Review

Section 437c requires the trial court to grant summary judgment if the papers submitted on the motion show that "there is no triable issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law." (§ 437c, subd. (c).) There is a genuine issue of material fact only if, in accordance with the applicable standard of proof, a reasonable trier of fact could find the underlying fact in favor of the party opposing the motion. (*Mammoth Mountain Ski Area v. Graham* (2006) 135 Cal.App.4th 1367, 1371.)

We review the trial court's entry of summary judgment de novo and independently review the record to determine if summary judgment is merited. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) In reviewing a summary judgment, we review the prevailing party's submissions strictly and the losing party's liberally. (*Mammoth Mountain Ski Area v. Graham*, *supra*, 135 Cal.App.4th at p. 1370.) We accept as true the facts supported by the losing party's evidence and the reasonable inferences from them. (*Sada v. Robert F. Kennedy Medical Center*, *supra*, 56 Cal.App.4th at p. 148.) Evidentiary ambiguities or doubts are resolved in favor of the losing party. (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 768.)

"The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, p. 769; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 (*Guthrey*).) To the extent the parties refer to factual or procedural matters without record references or unsupported by the references given, we disregard such matters. (*Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451.) A """"'mere challenge to respondents to prove that the court was right'""" is deemed a waiver on appeal. (*Guthrey*, *supra*, 63 Cal.App.4th at pp. 1115–1116.)

2. The Undisputed Facts Establish That Howard Suspected or Should Have Suspected That She Had Been Injured By Wrongdoing More Than a Year Before the Howards Filed Their Action Against Lask.

Section 340.5 provides in relevant part: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury *or one year after the plaintiff discovers, or through the use of reasonable diligence should have*

discovered, the injury, whichever occurs first." (Italics added.) "It is well established that, '"[t]he term 'injury,' as used in section 340.5, means both a person's physical condition and its negligent cause."' [Citation.]" (*Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1295 (*Knowles*).) Mere suspicion of negligence suffices to trigger the limitation period; one need not know the actual negligent cause of the injury. (See *Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 397–398 (*Norgart*) [statute of limitations for wrongful death action by parents of daughter who committed suicide began to run shortly after her death, when parents suspected wrongdoing based on depression and suicide attempts, including use of defendant drug maker's product, though parents did not initially suspect drug maker]; *Jolly v. Eli Lilly Co*. (1988) 44 Cal.3d 1103, 1110–1111 (*Jolly*) [statute of limitations on action against DES manufacturers began to run when plaintiff suspected mother's ingestion of DES during pregnancy had caused plaintiff's injuries, though she did not know which company had manufactured particular drug].) As the Supreme Court said in *Jolly*:

"Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her . . . Plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly*, *supra*, 44 Cal.3d at pp. 1110–1111, fn. omitted.)

"In the aftermath of *Jolly*, courts have rejected the argument that the limitations period does not begin to run until a plaintiff learns the specific causal mechanism by which he or she has been injured." (*Knowles*, *supra*, 118 Cal.App.4th at p. 1298.)

To begin with, as Lask points out, the Howards fail to support their contention regarding the statute of limitations argument with a single citation to legal authority or to the record. An appellant's failure to support its argument with citation to legal authority amounts to an abandonment of the issue. (See *City of Oakland v. Hassey* (2008) 163

Cal.App.4th 1477, 1503 ["Having stated only a vague general legal principle without directing this court to the portion of the record which supports his contention, we treat this issue as waived"].) As several commentators observe: "Appellant's burden . . . includes the obligation to present *argument and legal authority* on *each point raised*. This requires more than simply stating a bare assertion that the judgment, or part of it, is erroneous and leaving it to the appellate court to figure out why; it is not the appellate court's role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness. [Citation.] [¶] When appellant asserts a point but fails to support it with reasoned argument and citations to authority, the court may treat it as *waived* and pass it without consideration." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 8:17.1, pp. 8-5–8-6.) The absence of legal authority, combined with the failure to provide appropriate citations to the volume and page number of the record where the matter appears (Cal. Rules of Court, rule 8.204(a)(1)(C)), indeed reveals, as Lask points out, the Howards' abandonment of these issues on appeal.

On the merits, the Howards' contention fares no better. It is not necessary that Howard knew *how* Lask was allegedly negligent; the statute of limitations began to run when she suspected she was treated improperly. (*Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 823–824.) Here, the evidence demonstrates that the Howards suspected negligence as early as July or August 2005. Lynette Howard admitted during her deposition that she was told by a physician in July or August 2005 that her brain imaging studies were incorrectly interpreted by her radiologist. She also admitted that she ordered copies of her medical records in June or July 2005. The evidence corroborates that the Howards ordered a copy of Lynette Howard's medical records, through their attorney, in June 2005. The authorization form itself states the information requested "will be used for the purpose of aiding the Individual and his or her attorney in establishing the liability, nature and extent of a claim for injuries and disabilities." The Howards signed this form on July 6, 2005. They did not file their lawsuit against Lask until April 2, 2007, almost two

years later. The undisputed facts establish that the action against Lask was untimely,[5] and we reject appellants' contrary contention.

3. The Undisputed Facts Do Not Establish Lask's Actions Were Beneath the Standard of Care or That They Caused Howard's Injuries.

The Howards contend that their experts' declarations "directly contradicted" those of Lask's experts, "thereby creating a number of triable issues of material fact, all of which relate ultimately to the issue of whether RESPONDENT Lask was medically negligent and whether that negligence was a substantial factor in causing APPELLANTS' injuries." They cite to their two experts' declarations, but not to any particular page, paragraph, or sentence within these documents. No effort is made to connect any part of these documents to the enumerated material facts on which Lask's motion for summary judgment was based. The Howards' scant presentation in their opening brief regarding their medical negligence claim against Dr. Lask lacks meaningful legal authority and proper references to the record and is not a """"fair and sincere effort to show that the trial court was wrong,""""" and we conclude their claim that the trial court erred in granting summary judgment to Lask is therefore forfeited. (*Guthrey*, *supra*, 63 Cal.App.4th at pp. 1115–1116.)

Even if the Howards had not forfeited this contention, it is unpersuasive on the merits. Lask demonstrated through the declarations of Dr. Neil E. Schwartz, a neurologist, and Dr. Franklin G. Moser, a radiologist, that Lask's conduct did not cause Howard's injuries because: (1) he correctly interpreted the CT scans; (2) he had no duty to directly contact Howard's other physicians about his findings; and (3) even if he had contacted the physicians and if Howard had been admitted, nothing Lask could have done would have prevented Howard's later stroke because there is no evidence that Heparin has any therapeutic effect when given for an acute stroke and may even increase the risk

---

[5] The Howards do not argue that their substitution of Lask for Doe 1 should "relate back" to the original filing of their complaint in May 2006, and we thus do not address the relation back doctrine's applicability in the circumstances presented here.

for recurrent stroke. Lask met his burden of demonstrating that the Howards could not establish the element of causation, and the burden thus shifted to the Howards to establish the existence of a triable issue of material fact. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 853–854; Code Civ. Proc., § 437c, subd. (o)(2).)

The Howards' first expert, Dr. Robert Hurwitz, opined that Dr. Lask fell below the standard of care by failing to ensure that his findings were communicated to Lynette Howard's treating physicians. The second expert, Dr. Waters, also opined that Lask should have notified Howard's physicians of his findings "so that they may have her return to Antelope Valley Hospital for further neurological evaluation and emergent treatment." Waters concluded that "[t]o a reasonable degree of medical certainty, it is my opinion that if Lynette Howard would have been properly treated during this window of time, she would not have suffered the ultimate injury in this case." Waters did not state what he meant by "properly treated." He did opine that if "Howard had been started on Heparin on May 14, 2005 she would not have suffered from the additional deficits which resulted from her recurrent strokes that she has today."

The Howards' experts failed to establish, even if Lask had reported his findings directly to Howard's treating physicians, that *those* physicians would have readmitted her *or* administered Heparin. Dr. Waters, most notably, failed to state with any degree of certainty that the physicians would have had her return or that if they had done so, what treatment they would have provided. Neither expert demonstrated any triable issue of material fact existed to establish a causal link between Lask's alleged failure to communicate and Howard's injuries.

An expert cannot speculate as to how a third party would act. (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 973–974.) "[W]hen an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests.'" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117, quoting *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524–525.) The Howards fail

to establish that a triable issue of material fact exists as to whether Lask caused Howard's injuries, and this additional ground supports summary judgment for Lask.

4. The Undisputed Facts Established Janumpally Had No Relationship With Howard From Which a Duty of Care Ever Arose.

The Howards contend Janumpally owed a duty of care to Howard based on an implied physician-patient relationship. They ask this court to take into consideration their "properly authenticated evidentiary offerings," which they failed to submit with their opposition to Janumpally's motion for summary judgment.

The existence of a duty is a question of law for the court. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6; *Rainer v. Grossman* (1973) 31 Cal.App.3d 539, 542–543 (*Rainer*).) In the medical malpractice context, liability arises where there is a relationship of physician-patient between the plaintiff and the defendant doctor; the relationship gives rise to the duty of care. (*Keene v. Wiggins* (1977) 69 Cal.App.3d 308, 313; *Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1471; *Felton v. Schaeffer* (1991) 229 Cal.App.3d 229, 235–236; 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 935, p. 171.) As one scholar has observed, the hallmarks of a physician-patient relationship "are: (1) affirmative treatment of an individual; or (2) a benefit bestowed upon the individual, such as medical advice." (Comment, *Expanding the Potential Tort Liability of Physicians: A Legal Portrait of "Nontraditional Patients" and Proposals For Change* (1993) 40 UCLA L. Rev. 1617, 1632.) "In the usual case of medical malpractice, the duty of care springs from the physician-patient relationship which is basically one of contract." (*Rainer*, *supra*, 31 Cal.App.3d at p. 543.) When a physician-patient relationship exists, "the patient has a right to expect the physician will care for and treat him with proper professional skills and will exercise reasonable and ordinary care and diligence toward the patient [citation]." (*Keene v. Wiggins*, *supra*, 69 Cal.App.3d at p. 313.)

There is no indication that Janumpally ever met, examined, or treated Howard, nor is there any evidence in the record that Janumpally ever billed Howard or her insurance company for any care or treatment. He did not prepare any medical reports, records, or

billings in reference to her, and he had no medical chart on her.[6] There is also no admissible evidence to show that Janumpally's involvement in Howard's care was anything more than an informal request by a colleague for an opinion with respect to Howard's stroke. There was nothing unusual in that request, and, indeed, as Janumpally testified at deposition, the hospital had a procedure in place for just such requests, as well as for "consults."

The "exchange of information between doctors is of great social benefit." (*Rainer, supra*, 31 Cal.App.3d at p. 544.) In *Rainer*, a visiting gastroenterologist addressed a group of physicians and surgeons at a medical education lecture for about an hour. "[V]arious cases and X-rays were presented for discussion." (*Id.* at p. 542.) Plaintiff's treating physician presented her case with X-rays at the lecture, without mentioning her by name. The visiting lecturer gave an opinion that in such a case as plaintiff's, surgery was indicated. Plaintiff's physician made this recommendation to plaintiff, and surgery followed. The court found no duty: "Defendant here was dealing with medical doctors who were not under his direction or control. He was entitled to assume that these doctors were cognizant of the circumstances under which the various cases were discussed, i.e., without defendant having personally examined the patient, and would themselves in dealing directly with their patients rely on their own ultimate opinions following proper medical procedures. Imposition of liability under these circumstances would not be prophylactic but instead counter-productive by stifling efforts at improving medical knowledge." (*Id.* at p. 544.)

As in the somewhat analogous circumstances in *Rainer, supra*, Janumpally communicated (if at all) only with Lee, the treating ER physician, who was not under Janumpally's direction or control. Janumpally was "entitled to assume" that Lee knew the circumstances under which they discussed Howard's case, most notably, without

---

[6] Despite Lee's treatment plan, namely, that Howard was to be admitted to AVH under the joint care of Swissa and Janumpally, no one disputes that that event never occurred.

Janumpally having personally examined Howard. (*Rainer*, *supra*, 31 Cal.App.3d at p. 544.) The Howards cite no legal authority that would impose a duty in this case, and we conclude that Janumpally's request that Heparin not be given was insufficient to give rise to an implied physician-patient relationship and a concomitant duty of care owed to Howard. Absent a relationship, there was no duty and thus no viable claim against Janumpally.

5. The Trial Court Did Not Abuse Its Discretion in Entering Judgment Without First Waiting for the Howards to Move for Reconsideration and Then Rule on Such Motion.

The Howards contend the trial court abused its discretion in "stripping APPELLANTS of the opportunity to move for reconsideration" when it entered judgments for Lask and Janumpally.[7] The Howards acknowledged in their motions for reconsideration and reply briefs in support of those motions that the trial court lost jurisdiction to rule on the motions once judgment was entered. They argue, though, that the trial court's entry of judgment when it was aware of their intention to move for reconsideration was prejudicial and an abuse of discretion. We disagree.

"Section 1008, subdivision (a) requires that a motion for reconsideration be based on new or different facts, circumstances, or law. A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time. [Citation.]" (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212.) A trial court's ruling on a motion for reconsideration under section 1008 is reviewed for an abuse of discretion. (*Ibid.*)

---

[7] The Howards do not contest the trial court's authority to reconsider its prior ruling on Lask's motion for summary judgment, nor could they. (See *Francois v. Goel* (2005) 35 Cal.4th 1094, 1108 ["If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief."].)

The Howards are correct that trial courts lack jurisdiction to consider a motion for reconsideration after judgment is entered. (See, e.g., *Safeco Ins. Co. v. Architectural Facades Unlimited, Inc.* (2005) 134 Cal.App.4th 1477, 1482; *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 180–182 [trial court loses jurisdiction to rule on reconsideration motion where judgment is entered after filing of reconsideration motion, but before ruling].) At the hearing on June 12, 2008, counsel for the Howards announced her intention to file a motion for reconsideration, yet did not request at that time that the court stay entry of judgment pending her filing of the reconsideration motion or a ruling on that motion. The Howards did not file the motion with respect to Lask until June 24, 2008, and the motion with regard to Janumpally until June 25, 2008. If having a motion for reconsideration on file is not enough to prevent a trial court from losing jurisdiction upon entry of judgment, then merely announcing one's intention to file such a motion necessarily has even less effect when it comes to preserving the court's jurisdiction to rule. As for the Howards' suggestion that the trial court's entry of judgment "divested" them of a chance to challenge the ruling, this is not quite accurate: they remained free to move for a new trial or to vacate the judgment. (See *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1606.)

In any event, the Howards cannot establish prejudice here. When seeking reconsideration of a court order under section 1008, subdivision (a), the moving party must present "new or different facts, circumstances, or law." In the motion pertaining to Lask, the Howards rely on changes Howard made to her deposition testimony, particularly the testimony Lask relied on in his motion and on which the court ultimately relied in ruling for Lask, over three months *after* Lask filed his motion papers. Reversing her deposition admission that she was told that Dr. Lask incorrectly interpreted her brain scans, Howard changed her answer to state that she was "never told that." Howard explained in her declaration that "after further reflection and clarification," she realized she was never told or suspected that Dr. Lask was negligent.

It is beyond dispute that a party cannot create a triable issue of material fact by contradicting himself. Whether the attempt to establish a contradiction is through

testimony or affidavits, the result is the same: "[W]hen a defendant can establish his defense with the plaintiff's admission sufficient to pass the strict construction test imposed on the moving party, the credibility of the admissions are valued so highly that the contradicting affidavits may be disregarded as irrelevant, inadmissible or evasive [citations]. . . . [¶] There is no reason to draw a distinction between an attempt to counter an admission by affidavit and an attempt to counter an admission by changing the content of an answer given by a party directly in a deposition, especially where there is no assertion the original answer was incorrectly transcribed or the question was misleading or ambiguous." (*Gray v. Reeves* (1977) 76 Cal.App.3d 567, 573–574 [rejecting belated changes to deposition answers when the changes appear "inspired . . . by pressures attending an apparently grantable motion for summary judgment."]; see also *Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 849–850 [affirming trial court's rejection of plaintiff's attempt to change deposition answers to avoid admission].)

As noted, Howard admitted during her deposition that she suspected in the summer of 2005 that Lask had acted negligently. The court reporter had the original transcript delivered to Howard's counsel the third week in January 2008. Lask's motion for summary judgment, based in large part on Howard's admissions, was filed in late January 2008. The Howards did not rely in their opposition to the summary judgment motion on changes to Howard's deposition testimony, nor did they indicate at the hearing on April 22, 2008, that Howard's answers were inaccurate. Howard only made the changes in May 2008, *after* the hearing on the Lask and Janumpally motions. The Howards cannot avoid the effect of Howard's admissions by "correcting" the transcript in support of a motion for reconsideration. Even if the court had withheld entering judgment to consider the Howards' motion for reconsideration, Howard's reversal of her deposition testimony under these circumstances would have been extremely unlikely to trigger a different outcome. We reject this contention.

6. The Trial Court Did Not Abuse Its Discretion in Denying the Howards' Motion for Reconsideration of the Janumpally Summary Judgment.

The Howards contend the trial court abused its discretion in denying their motion for reconsideration of the Janumpally summary judgment because the denial prevented them from curing their procedural error, notably, their failure to properly authenticate the documents they had submitted in opposition to Janumpally's motion. The Howards argue that the trial court's April 22, 2008 tentative ruling shows that Janumpally's motion would have been denied on the merits, but for the procedural glitch. Even if the trial court had not already entered judgment on the order granting Janumpally summary judgment, thereby divesting the court of jurisdiction to hear the motion for reconsideration, we find no merit in this contention.

As noted, the moving party bears the burden on a motion for reconsideration under section 1008 to show both "new or different facts, circumstances, or law" and a satisfactory explanation for failing to produce the evidence earlier. (*New York Times Co. v. Superior Court, supra*, 135 Cal.App.4th at p. 212.) The Howards appear to argue that the "new evidence" consisted of "properly authenticated medical records, deposition testimony that met the standards of California Rules of Court Rule 3.116 and a declaration of excusable neglect by APPELLANTS' counsel." They do not state in their appellate brief why this evidence could not have been provided earlier. In their motion for reconsideration, they refer generally to their counsel's declaration (again, with no page, paragraph, or line citations). There, counsel states "[e]rrs [sic] occurred" in compiling exhibits, specifically, her secretary failed to follow counsel's instructions to include title pages with the deposition exhibits, and counsel neglected to include the "necessary authenticating pages" for the medical record exhibits.[8] As for the medical records, counsel acknowledges "frequently submit[ting] medical records as evidence in

---

[8] Counsel does take responsibility for failing to *ensure* the deposition title pages were included.

law and motion practice," but only now realizing that her practice has been improper. But for her excusable neglect, counsel argues, the Howards would have defeated Janumpally's summary judgment motion.

The Howards have not identified any abuse by the trial court of its discretion, even assuming it still had jurisdiction to consider the motion for reconsideration. Our own review of the record reveals no such abuse either. We reject the suggestion that the procedural requirements of section 437c are unimportant technicalities. "Section 437c is a complicated statute. There is little flexibility in the procedural imperatives of the section, and the issues raised by a motion for summary judgment . . . are pure questions of law. As a result, section 437c is unforgiving; a failure to comply with any of its myriad requirements is likely to be fatal to the offending party." (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607.) The Howards have not identified a single document that indicates there was ever a physician-patient relationship between Janumpally and Howard. Absent such a relationship, as noted, no duty of care arose, and there could be no basis for finding Janumpally was liable for negligence in the care or treatment of Howard. We conclude there was no error and, in any event, no prejudice and reject this contention accordingly.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.